NANDA KUMAR KUNYIKANAN & ANOR A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
HASAN LAH JCA
ABDUL MALIK ISHAK JCA
AZHAR MA'AH JCA
[CRIMINAL APPEAL NO: J-05-18-2008]
8 JUNE 2011 C

CRIMINAL PROCEDURE: *Witness - Material witness - Prosecution unable to produce eye-witnesses who fled scene of drug trafficking - Whether testimony of witnesses could have altered verdict of case - Whether deliberate attempt by prosecution to frustrate defence - Police attempts to locate and arrest witnesses futile - Whether failure amounted to withholding or suppression of evidence - Whether s. 114(g) Evidence Act 1950 applicable* D

The appellants were jointly charged, convicted and sentenced to death by the High Court for trafficking in 6004.3g cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The appellants appealed the verdict to the Court of Appeal. According to the facts, based on information from a police informer about a person offering to sell a large quantity of drugs, a police officer ('SP7') directed a detective corporal ('SP4') to be an agent provocateur and, through the informer, meet with the appellants who were prepared to sell the drugs. On the appointed day and time, the appellants met with SP4 in front of a hotel, and after counting the money SP4 had brought with him for the purchase of the drugs, one of them made a telephone call. Shortly after, a lorry arrived at the scene and when it had stopped, the first appellant unloaded a box from the back of the lorry, opened it in SP4's presence and showed SP4 the drugs contained inside. On SP4's pre-arranged signal, a police party lying in ambush sprang into action and arrested both the appellants and seized the drugs. E F G H

The appellants denied the prosecution's version of events. The first appellant said the lorry belonged to one Zakaria, whose son, Shaiful ('SP9') together with two other persons named Hairil and Kamarulzaman, were in the lorry at the material time. The first appellant said he was directed by Kamarulzaman to unload boxes from the back of the lorry at the hotel but after he had unloaded I

A one box, Kamarulzaman closed the back door of the lorry, got back into the lorry and left. The appellant said he did not know of the contents of the boxes as he did not open them.

The lorry's owner, Zakaria, died before the prosecution had closed
B its case in the trial. However, SP9, who was arrested by police the day after the incident at the hotel, had told the trial that after the lorry arrived at the hotel, Kamarulzaman got out of the lorry to speak with the first appellant and then got back into the lorry. When they spotted the police party after the first appellant had
C unloaded a box from the lorry, Kamarulzaman told Hairil, who was driving the lorry, to speed off.

The appellants argued there was every possibility the drugs belonged to Hairil and Kamarulzaman and that they were material witnesses who could explain what transpired at the hotel. They
D alleged the police failed to diligently locate and arrest Hairil and Kamarulzaman and therefore adverse inference under s. 114(g) of the Evidence Act 1950 should be invoked against the prosecution.

Held (dismissing the appeals and affirming the convictions
E **and sentences on the appellants)**
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) The failure of the prosecution to call Hairil and Kamarulzaman
F to testify cannot be categorised as "withholding or suppression of evidence". Concerted attempts to trace them were not successful. They were outside the control of the prosecution. Consequently, s. 114(g) of the Evidence Act should not be invoked. (para 67)

G

(2) Despite the fact SP7 acted on information received from the informer, which information was not reduced into writing as required by s. 107(1) of the Criminal Procedure Code, it could not *per se* be construed as hearsay, prejudicial and inadmissible.
H The whole evidence had to be looked at in its correct perspective. (paras 77 & 83).

(3) There was ample evidence through the agent provocateur, SP4, upon which the appellants were found guilty and convicted without occasioning any miscarriage of justice.
I There was also supportive evidence of SP5, SP6 and SP9, all pointing to the guilt of both the appellants. (para 77)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu telah dituduh bersama, disabit dan dihukum mati oleh Mahkamah Tinggi bagi kesalahan mengedar 6004.3g cannabis di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Perayu-perayu telah merayu terhadap keputusan tersebut ke Mahkamah Rayuan. Menurut fakta, berdasarkan maklumat daripada pemberi maklumat polis berkenaan seorang yang menawar untuk menjual dadah berkuantiti besar, seorang pegawai polis ('SP7') telah mengarahkan seorang detektif korporal ('SP4') untuk menjadi ejen provokatur dan, melalui pemberi maklumat tersebut, berjumpa dengan perayu-perayu yang bersedia untuk menjual dadah. Pada hari dan masa yang dilantik, perayu-perayu telah berjumpa dengan SP4 di hadapan sebuah hotel, dan selepas mengira wang yang telah dibawa oleh SP4 untuk pembelian dadah, seorang lagi telah membuat panggilan telefon. Sejurus kemudian, sebuah lori telah sampai di tempat kejadian dan selepas ia berhenti, perayu pertama telah mengeluarkan sebuah kotak dari bahagian belakang lori tersebut, membukanya dalam kehadiran SP4 dan menunjukkan dadah yang terdapat di dalamnya kepada SP4. Pada tanda isyarat SP4 yang diatur terlebih dahulu, pihak polis yang telah bersedia untuk menyerang telah bertindak dan menahan kedua-dua perayu dan merampas dadah tersebut.

Perayu-perayu menafikan versi pendakwa raya berkenaan kejadian yang telah berlaku. Perayu pertama menyatakan bahawa lori tersebut adalah kepunyaan seorang Zakaria, di mana anaknya, Shaiful ('SP9') bersama-sama dua orang lagi bernama Hairil dan Kamarulzaman, telah berada di dalam lori pada masa material tersebut. Perayu pertama menyatakan bahawa dia telah diarahkan oleh Kamarulzaman untuk mengeluarkan kotak-kotak daripada bahagian belakang lori di hotel tetapi selepas mengeluarkan satu kotak, Kamarulzaman telah menutup pintu belakang lori itu, memasuki semula ke dalam lori dan berlepas. Perayu menyatakan bahawa dia tidak tahu akan kandungan di dalam kotak-kotak tersebut kerana dia tidak membukanya.

Pemilik lori, Zakaria, telah meninggal dunia sebelum pihak pendakwa raya menutup kesnya pada waktu perbicaraan. Walau bagaimanapun, SP9, yang telah ditangkap oleh polis sehari selepas kejadian di hotel, telah memberitahu semasa perbicaraan bahawa selepas lori tersebut sampai di hotel, Kamarulzaman telah keluar dari lori untuk bercakap dengan perayu pertama dan selepas itu,

telah kembali masuk ke dalam lori. Semasa mereka nampak pihak polis, iaitu selepas perayu pertama telah mengeluarkan sebuah kotak dari lori, Kamarulzaman memberitahu Hairil, pemandu lori, untuk memecut.

Perayu-perayu berhujah bahawa terdapat setiap kemungkinan bahawa dadah tersebut adalah kepunyaan Hairil dan Kamarulzaman dan mereka adalah saksi-saksi material yang boleh memberi penjelasan berkenaan apa yang telah berlaku di hotel. Mereka telah menuduh bahawa pihak polis telah gagal untuk menempatkan dengan teliti dan menangkap Hairil dan Kamarulzaman dan oleh itu, inferens memudaratkan di bawah s. 114(g) Akta Keterangan 1950 perlu digunakan terhadap pihak pendakwa raya.

Diputuskan (menolak rayuan; sabitan dan hukuman dikekalkan terhadap perayu-perayu)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Kegagalan pihak pendakwa raya untuk memanggil Hairil dan Kamarulzaman bagi memberi keterangan tidak boleh dikategorikan sebagai "menahan atau menyekat keterangan". Segala percubaan untuk mengesan mereka tidak berjaya. Ini adalah di luar kawalan pihak pendakwa raya. Oleh itu, s. 114(g) Akta Keterangan tidak boleh digunakan.

(2) Walau pun SP7 telah bertindak atas maklumat yang diterimanya daripada pemberi maklumat, maklumat di mana yang tidak bertulis seperti kehendak s. 107 Kanun Tatacara Jenayah, ianya tidak boleh ditafsirkan sebagai keterangan dengar cakap sahaja, berprejudis dan tidak boleh diterima masuk. Segala keterangan di sini perlu dilihat pada perspektif yang betul.

(3) Terdapat banyak bukti melalui ejen provocateur, SP4, di mana perayu-perayu telah didapati bersalah dan dihukum tanpa salah laksana keadilan. Juga terdapat keterangan menyokong SP5, SP6 dan SP9 yang menunjukkan kebersalahan perayu-perayu.

Case(s) referred to:
Abdul Ghani Jusoh & Anor v. PP [1980] 1 LNS 179 ***(refd)***
Andy Bagindah v. PP [2000] 3 CLJ 289 CA ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan King Yu v. PP [2009] 1 CLJ 601 FC ***(refd)***
Chan Kwok Keung & Anor v. The Queen [1990] 1 CLJ 411; [1990] 3 CLJ (Rep) 386 CA ***(refd)***

Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
DA Duncan v. PP [1980] 1 LNS 12 FC ***(refd)***
Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA ***(refd)***
Hardy [1794] 24 State Tr 199 ***(refd)***
K Saravanan S Karuppiah v. PP [2002] 4 CLJ 144 CA ***(refd)***
Khoo Hi Chiang v. PP & Another Case [1994] 2 CLJ 151 SC ***(refd)***
Kuruma, Son of Kaniu v. The Queen [1955] AC 197 ***(refd)***
Lee Lee Chong v. PP [1998] 4 CLJ 655 CA ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mawaz Khan and Amanat Khan v. The Queen [1967] 1 AC 454 ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***
Ooi Hock Leong v. Regina [1995] 1 LNS 84 ***(refd)***
PP lwn. Mohd Isha Alias & Satu Lagi [2003] 2 CLJ 142 CA ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Chong Chee Kin & Anor [1995] 1 LNS 301 HC ***(refd)***
PP v. Chong Nyuk Min & Anor [1995] 1 LNS 182 HC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Lam San [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391 SC ***(refd)***
PP v. Leonard [1959] 1 LNS 75 HC ***(refd)***
PP v. Low Soo Song [2004] 1 LNS 82 ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Mohamed Halipah Adan [1981] CLJ 92; [1981] CLJ (Rep) 238 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Neoh Wan Kee [1984] 1 LNS 135 HC ***(refd)***
PP v. Nur Hassan Salip Hashim & Anor [1993] 2 CLJ 551 HC ***(refd)***
PP v. Ooi Teng Chian [2005] 4 CLJ 557 CA ***(refd)***
PP v. Padi Abdullah [1989] 1 CLJ 816; [1989] 2 CLJ (Rep) 361 HC ***(refd)***
PP v. Reza Mohd Shah Ahmad Shah [2002] 1 LNS 157 HC ***(refd)***
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***
R v. Timothy John Hennessey [1979] 68 Cr App R 419 ***(refd)***
Srichand K Khetwani v. The State of Maharashtra [1967] AIR SC 450 ***(refd)***
Subramaniam v. PP [1956] 1 WLR 965 ***(refd)***
Tee Thian See v. PP [1997] 5 CLJ 654 HC ***(refd)***
The Queen v. Benz And Another [1989] 168 CLR 110 ***(refd)***
Vijayaratnam v. PP [1961] 1 LNS 149 HC ***(refd)***
Walton v. The Queen [1988-1989] 166 CLR 283 ***(refd)***
Yeo Choon Huat v. PP [1998] 1 SLR 217 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 2, 107(1), 113, 399
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a), (2), 40(3), 40A
Evidence Act 1950, ss. 45, 114(g)
Penal Code, s. 34

For the 1st appellant - Subash Ramasamy; M/s Chand, Jag & Assocs
For the 2nd appellant - Gobind Singh Deo (S Prakash with him); M/s Gobind Singh Deo & Co
For the respondent - Tengku Amir Zaki Tengku Hj Abdul Rahman DPP

[Appeal from High Court, Johor Bahru; Criminal Trial No: MT3-45-54-2003]

Reported by Ashok Kumar

JUDGMENT

Abdul Malik Ishak JCA

Introduction

[1] Both the appellants were jointly charged and tried in the High Court of Johor Bahru that they together at about 8pm. on 24 August 2002 in front of Hotel Apollo, Jalan Nakhoda 7, Taman Ungku Aminah in the district of Johor Bahru in the State of Johor Darul Takzim trafficked in dangerous drugs, to wit, 6004.3 grammes of cannabis and had therefore committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") and punishable under s. 39B(2) of the same Act read together with s. 34 of the Penal Code.

[2] At the conclusion of the trial, they were convicted and sentenced to death. They filed notices of appeal and we heard them. At the end of the hearing, we dismissed their appeals and affirmed the decisions of the High Court of Johor Bahru. We now give our reasons.

The Facts

[3] On 20 August 2002, ASP Charun Aai Been (SP7) received an information from an informer, one male Chinese, that one male Indian was offering to sell 20 kilogrammes of ganja at the price of RM1,200 per kilogramme.

[4] On 21 August 2002, SP7 directed Detective Corporal Yusof Keling (SP4) to be an agent provocateur. A

[5] On 22 August 2002, SP7 introduced SP4 to the informer.

[6] On 22 August 2002, SP4 met the informer outside the restaurant area at Taman Ungku Tun Aminah. At that time, the informer introduced SP4 to two male Indians. SP4 then spoke about the purchase of ganja with the two male Indians. Both the male Indians stated that one kilogramme of ganja priced at RM1,200 per kilogramme. Both the male Indians were identified by SP4 as the first appellant ("A1") and as the second appellant ("A2"). One of the appellants stated that he would contact SP4 in two days time if the supply of ganja was obtained. B C

[7] On 24 August 2002, SP4 received a telephone call *via* hand phone from one of the appellants who asked to meet SP4 on the same day at 3pm in the vicinity of Tasik supermarket at Taman Ungku Tun Aminah. SP4 agreed and he met both the male Indians at the designated place. In the meeting, one of the male Indians stated that the supply of 20 kilogrammes of ganja was already available. Both the male Indians then asked SP4 to get ready a sum of RM22,000. And it was agreed that the ganja would be handed to SP4 in front of Hotel Apollo at Taman Ungku Tun Aminah between 7.30pm to 8pm on 24 August 2002. D E

[8] SP4 briefed SP7 about the latest development. SP7 then gave RM22,000 to SP4 in denominations of RM50 and RM100 and the monies were put in a waist pouch. It was agreed that if the ganja was identified, SP4 should wipe his hair with his hand as a signal for the police party to ambush the targets. F

[9] On 24 August 2002 at 6.15pm, SP4 went to Hotel Apollo in a motor car accompanied by Lance Corporal Sabran (SP5). On arrival at the said hotel, the motor car was parked near to the said hotel. G

[10] In the meantime, Chief Inspector Zamri Razab (SP6) together with the rest of the police party who attended the briefing given by SP7 earlier on had arrived at the vicinity of Hotel Apollo and they took up ambush positions focussing their attention on SP4 and awaiting the signal which would be given by SP4. H I

[11] On 24 August 2002 at 7.30pm, A2 arrived on a motorcycle and he met SP4. A2 wanted to see and count the monies in the sum of RM22,000. The counting was done in the motor car which SP4 used to go to the said hotel. After that, A1 also arrived and he too counted the monies in the sum of RM22,000 in the same motor car. Thereafter, A1 telephoned someone and about ten minutes later, a motor lorry arrived and when it stopped A1 unloaded one box (exh. P5) from the back of the motor lorry. That box was brought down by A1 and he showed it to SP4. A1 opened the box in the presence of SP4 and SP4 saw inside the box compressed dried leaves suspected to be ganja.

[12] After SP4 identified the subject matter to be ganja, he gave the pre-requisite signal and the police party swung into action and arrested A1 after a brief struggle and A2 after a short chase and seized the compressed dried leaves suspected to be ganja.

[13] The compressed dried leaves found in the box were sent to the Government Chemist, Encik Abdullah bin Mohd Yusof (SP1), for analysis. SP1 analysed and certified the compressed dried leaves to be cannabis within the meaning of s. 2 of the Act, weighing a total of 6004.3 grammes. SP1 also prepared a chemist report as per exh. P12.

[14] It is germane to mention that in the Malay language, the word "cannabis" is often referred to as "ganja".

***Prima facie* Case**

[15] At the close of the case for the prosecution, the learned Judicial Commissioner ("JC"), after subjecting the prosecution evidence to maximum evaluation (*PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215; *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734, CA; and *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, FC), categorically held that the prosecution had proved a *prima facie* case against both A1 and A2 (*Balachandran v. PP* [2005] 1 CLJ 85, FC).

[16] The learned JC also held that both A1 and A2 had common intention to traffick in the dangerous drugs, to wit, 6004.3 grammes of cannabis. Section 34 of the Penal Code gives statutory recognition to the principle that when two persons intentionally do a thing jointly, it is just the same as if they had done it individually. The learned JC recognised this simple principle of law and he applied it vigorously.

[17] The learned JC was satisfied on the strength of the evidence adduced by the prosecution that there was common intention between A1 and A2 when both of them offered to sell the drugs and both of them were also present in front of Hotel Apollo when the drugs were sent. Both A1 and A2 actively discussed with SP4 from the very beginning about the sale of the drugs.

[18] The learned JC also held that the prosecution was correct in not calling the informer to give evidence in court bearing in mind that the informer was protected by s. 40 of the Act. Consequently, the identity, the name and the address of the informer cannot be revealed. SP4 testified that the role of the informer was merely to introduce SP4 to both A1 and A2 (*Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221, SC). And the informer was not instrumental in the subsequent transactions which finally led to the arrest of both A1 and A2 on charges of trafficking in dangerous drugs. It must be emphasised that the informer disappeared from the scene after introducing SP4 to A1 and A2.

[19] On the available evidence, the learned JC held that the prosecution had successfully proven by direct evidence that both A1 and A2 trafficked the dangerous drugs. He then called upon their defence.

The Defence At The High Court

[20] Both A1 and A2 elected to give their evidence on oath.

[21] A1 testified that on 24 August 2002, he worked as a carwasher and he did part time work with a company owned by Encik Zakaria bin Mohamed Ghazali – the father of Shaiful Asril bin Zakaria (SP9). In the said company, A1 was a general worker: pitching tents, delivering goods meant for marriage ceremony, delivering cutleries and utilities, etc.

[22] On 24 August 2002, Encik Zakaria bin Mohamed Ghazali directed A1 to deliver goods meant for marriage ceremony at Hotel Apollo that was ordered by clients. So A1 proceeded by motorcycle from the petrol station at Ulu Tiram where he worked as a car washer to go to Hotel Apollo. The time was about 6.30pm to 6.45pm. But on the way to Hotel Apollo, the motorcycle which A1 rode gave trouble at Tampoi. For this reason, according to A1, he telephoned his friend, namely A2.

[23] A2 arrived at Tampoi at about 6.30pm. A1 then rode pillion on A2's motorcycle and they both proceeded to Hotel Apollo and they arrived at the said Hotel at about 7pm. Soon thereafter, the motor lorry belonging to Encik Zakaria bin Mohamed Ghazali arrived at the said hotel. Inside the motor lorry were three persons known to A1, namely, SP9, Hairil and Kamarulzaman.

[24] According to A1, the motor lorry stopped at Hotel Apollo for about ten minutes and its engine was left running. According to A1, Kamarulzaman alighted from the motor lorry and spoke to some customers whom A1 did not know. Thereafter A1 was directed by Kamarulzaman to unload boxes from the back of the motor lorry. There were two to three boxes. According to A1, Kamarulzaman had opened the door to the back portion of the said motor lorry. After A1 had unloaded only one box, Kamarulzaman then closed the back door of the said motor lorry. And Kamarulzaman re-entered the said motor lorry from its front part. According to A1, he did not open the boxes because he was not given the responsibility to open the boxes. That being the case, A1 did not know the contents of the boxes. A1 testified that he did not attempt to run away when the police ambushed him.

[25] Under cross-examination, A1 denied the following set of facts:

(a) that A1 went to a restaurant at Taman Ungku Tun Aminah, Skudai on 22 August 2002 to meet SP4 and the informer accompanied by A2;

(b) that A1 offered to sell the ganja to SP4 at the price of RM1,200 per kilogramme;

(c) that A1 telephoned SP4 on 24 August 2002 at 11am for the purpose of meeting SP4 in the vicinity of Tasik supermarket at Taman Ungku Tun Aminah on the same day at 2pm;

(d) that A1 met SP4 at the same spot as per (c) above at 2pm and, once again, offered to sell the drugs and requested SP4 to get ready a sum of RM22,000 and A1 would hand over the drugs at Hotel Apollo at 7.30pm to 8.30pm of the same day;

(e) that A1 went to Hotel Apollo alone after he was contacted *via* telephone by A2;

(f) that A1 entered SP4's motor car at Hotel Apollo and counted monies amounting to RM22,000 inside the motor car; and

(g) that A1 telephoned someone and soon thereafter the motor lorry arrived at Hotel Apollo.

[26] However, A1 admitted that he unloaded one box (exh. P5) from the back of the motor lorry. But A1 denied that he opened the box (exh. P5) to see its contents, and, consequently, A1 did not know the contents of the said box.

[27] A1 disagreed that when the police ambushed, he tried to run away. A1 also disagreed that there was a scuffle between him and the police. A1 also disagreed that he tried to run away because he knew the contents of the said box.

[28] Even though A1 knew that there was no hall in Hotel Apollo to hold a wedding reception, yet A1 testified that he only obeyed the directions of Encik Zakaria bin Mohamed Ghazali and carried out his duties.

[29] There was no re-examination of A1.

[30] In his defence, A2 testified along the same lines as A1.

[31] According to A2, on the date of the incident he was working as a welder at Pasir Gudang. At 6pm, A2 received a telephone call from A1 stating that A1's motorcycle was spoilt and asking A2 to go to the Esso petrol station at Tampoi. A2 obliged and he went to the petrol station at 6.45pm and met A1. Thereafter they both went to Hotel Apollo.

[32] Upon arrival at Hotel Apollo, A2 stopped his motorcycle and A1 alighted from it. About 10 to 20 minutes later, a motor lorry arrived at the said Hotel. One person got down from the motor lorry. A1 approached the motor lorry and spoke to that individual. A2 kept his distance.

[33] A2 saw A1 unloaded one box from behind the motor lorry and put on the tarred road. But, according to A2, A1 did not open the box. The police then came and assaulted A2. The police then arrested A2 and brought him and A1 to the police station.

[34] Just like A1, A2 also denied that he met, discussed and made an offer to sell the drugs to SP4 on 22 August 2002 and on 24 August 2002. A2 also denied that he entered SP4's motor car in order to count RM22,000 and thereafter contacted A1 at Hotel Apollo on 24 August 2002.

[35] A2 testified that before 24 August 2002 he did not meet SP4 nor the informer at the restaurant at Taman Ungku Tun Aminah.

[36] Under cross-examination, A2 denied the following set of events:

(a) that on 22 August 2002, A2 went to a restaurant at Taman Ungku Tun Aminah to meet SP4 and the informer accompanied by A1 and there A2 offered to sell the ganja at RM1,200 per kilogramme;

(b) that on 24 August 2002 at 3pm, A2 and A1 met SP4 at the Tasik supermarket at Taman Ungku Tun Aminah and there A2 offered 20 kilogrammes of ganja to SP4;

(c) that A2 together with A1 promised to deliver ganja in front of Hotel Apollo on 24 August 2002 at 6.30pm to 7.30pm;

(d) that on 24 August 2002, A2 met SP4 in front of Hotel Apollo;

(e) that A2 entered the motor car to count the monies and after that A2 contacted A1 and the latter then came to Hotel Apollo;

(f) that A1 entered the motor car to count the monies and after that A1 contacted someone using A2's handphone and the motor lorry then came;

(g) that A2 was near to A1 when the motor lorry arrived at Hotel Apollo;

(h) that when the motor lorry arrived at Hotel Apollo no one alighted from the said motor lorry;

(i) that after the box was unloaded from the motor lorry A1 opened the said box and at that time A2 was next to A1;

(j) that when the box was opened, A2 saw its contents; and

(k) that A2 tried to flee when the police ambushed.

[37] However, A2 admitted that A1 was the one who unloaded one box from the back of the motor lorry. But A2 disagreed that he was near to the motor lorry when A1 brought down the box.

[38] There was no re-examination of A2.

[39] The learned JC, after reviewing the evidence of the prosecution as well as the defence, held that the appellants (A1 and A2) had not raised any reasonable doubt in the prosecution's case and found them guilty of the charge. Accordingly, the learned JC convicted and sentenced them to death.

Analysis

[40] In the face of the evidence led by the prosecution, the defence was one of mere denial. Both the appellants denied that they met, discussed and offered to sell the drugs to SP4 at RM1,200 per kilogramme.

[41] As reflected in the cross-examinations of A1 & A2, their denials were quite extensive challenging the evidence of the prosecution witnesses.

[42] A mere denial is no defence. A mere denial is insufficient to raise a reasonable doubt. A defence of this nature is not a good defence. Such a defence, if adopted, is detrimental to the accused. It will bring the accused straight to the hangman (*DA Duncan v. PP* [1980] 1 LNS 12, FC; *PP v. Nur Hassan Salip Hashim & Anor* [1993] 2 CLJ 551; *PP v. Reza Mohd Shah Ahmad Shah* [2002] 1 LNS 157; *Andy Bagindah v. PP* [2000] 3 CLJ 289, CA; *PP v. Low Soo Song* [2004] 1 LNS 82; and *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129, FC).

[43] An argument was advanced by learned counsel that the evidence of SP4 as an agent provocateur should not be accepted because there was no evidence that at the material time SP4 was a detective corporal. In *Abdul Ghani Jusoh & Anor v. PP* [1980] 1 LNS 179, the Federal Court held that the statement recorded by the Probationary Inspector was not a statement recorded in accordance with s. 113 of the Criminal Procedure Code ("CPC")

and was therefore inadmissible. Here, as an agent provocateur, the evidence of SP4 was caught by s. 40A of the Act. That section is worded in this way:

> Evidence of agent provocateur admissible
>
> 40A (1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.
>
> (2) Notwithstanding any rule of law or this Act or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial.

[44] On 17 April 2007 when SP4 first took the witness box and testified he was and is a police officer. On that date, SP4 was a detective corporal (see p. 22 of the appeal record). When SP4 was re-examined as reflected at p. 33 of the appeal record, he testified that in 1999, he was promoted to corporal. At that time, he said he was only a corporal. The notes of evidence read as follows:

> Pada tahun 1999, saya telah dinaikkan pangkat ke Kpl. Pada masa itu saya sebenarnya ialah Kpl.

[45] When SP4 gave his evidence on 19 April 2007, he testified at p. 51 of the appeal record that on 21 August 2002, he called D/Kpl Yusof bin Keling (SP4) to meet him and he directed SP4 to act as an undercover, disguised as a buyer for the supply of ganja. And on 22 August 2002 SP7 introduced SP4 – D/Kpl Yusof, to the informer. The notes of evidence read as follows:

> Pada 21.8.2002, saya telah memanggil D/Kpl Yusof bin Keling (SP4) untuk berjumpa dengan saya dan saya arahkan beliau untuk bertindak sebagai 'undercover', iaitu menyamar sebagai pembeli bekalan ganja tersebut.
>
> Pada 22.8.2002, saya telah perkenalkan D/Kpl Yusof dengan sumber berkenaan.

[46] Thus, SP4's position as a police officer of whatever rank has been proved beyond reasonable doubt in compliance with s. 40A(2) of the Act. A

[47] Next, it was argued that the prosecution failed to produce the monies in the sum of RM22,000. We ask ourselves, was it necessary to produce and tender the monies? We answer this question in the negative. We are not dealing with a charge of corruption where monies passed from the complainant to the accused should be tendered as evidence. Here, both A1 and A2 were jointly charged for trafficking in cannabis, to wit, 6004.3 grammes read with s. 34 of the Penal Code. The cannabis seized and analysed by the Government Chemist had been produced and tendered as exhibits. That would be sufficient, At any rate, there was evidence that SP7 gave the monies to SP4 and the monies were counted by A1 and A2 and after the arrest of both A1 and A2, SP4 returned the monies to SP7. B C D

[48] But it was argued by learned counsel that there was no record to show that RM22,000 was in fact given by SP7 to SP4 and eventually the monies were used in the sale and purchase of the drugs involving both the appellants. That being the case, the evidence of SP4 that A1 and A2 counted the monies in the motor car should not be accepted by the court. E

[49] However, the weight of the evidence showed that SP7 arranged with the head of the narcotics unit, namely, ACP Isnin for the monies to be released to SP4. The monies were put inside an envelope and then placed in a waist pouch. SP7 testified that he counted the monies before giving it to SP4. Imagine what would happen to the whole operation, if SP4 was not able to show the monies to A1 and A2 when they demanded to see and count the monies? According to SP4, he returned the monies to SP7 after both the appellants were arrested. This was also confirmed by SP7. F G

[50] In our judgment, the absence of any record in regard to the handing over of RM22,000 from ACP Isnin to SP7 and from SP7 to SP4 and from SP4 to SP7 after the successful operation, cannot affect the prosecution's case. H

[51] It is our judgment that the evidence of SP4 need no corroboration at all (*PP v. Mohamed Halipah* [1981] CLJ 155; [1981] CLJ (Rep) 238; *PP v. Padi Abdullah* [1989] 1 CLJ 816; [1989] 2 CLJ (Rep) 361; *PP v. Neoh Wan Kee* [1984] 1 LNS I

135; *Namasiyiam & Ors v. PP* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241, SC; and *Tee Thian See v. PP* [1997] 5 CLJ 654). The sterling and impeccable evidence of SP4 weighed heavily in favour of the prosecution.

[52] It is our judgment that the sale transaction of the drugs was complete when the sale price was determined and when both A1 and A2 had counted the monies and eventually the drugs were sent to SP4 at Hotel Apollo as promised. The sale was complete even though the money had not been paid (*PP v. Sa'ari Jusoh* [2007] 2 CLJ 197, FC) and "selling" is one of the acts of trafficking as set out in s. 2 of the Act and it is dependent on the facts of each particular case (*Chow Kok Keong v. PP* [1998] 2 CLJ 469, FC).

[53] It is wrong to submit as was submitted by learned counsel that the evidence of SP4 was inadmissible. Whatever evidence SP4 gave must be held to be credible and admissible because as an agent provocateur no corroboration was required. And whatever statements made by witnesses to SP4 and repeated by SP4 in his capacity as an agent provocateur in open court must be held to be admissible (*Namasiyiam & Ors v. PP (supra)*. It is pointless for Parliament to enact s. 40A of the Act if the court refuses to give effect to it. Parliament cannot act in vain and this court must give effect to s. 40A of the Act and apply it vigorously to SP4 in favour of the prosecution.

[54] Going on an uphill task, it was argued by learned counsel that the exact words used by SP4 must be proved before the evidence of SP4, as an agent provocateur, can be accepted by the court. This is not the law. There is no such requirement in s. 40A of the Act. It must be emphasised that s. 40A of the Act is a special provision to nab drug traffickers through the uncorroborated evidence of agents provocateurs.

[55] Next, it was argued that the learned JC failed to assess the credibility of SP4 on a maximum evaluation basis by comparing it particularly with the version of the prosecution as seen in exh. P17. Now, exh. P17 is the police report of SP6 that was lodged on 25 August 2002 at 4.20am *vide* Scudai report 8696/2002. It was worded as follows:

Pada 24/8/2002 jam lebih kurang 2000 hrs, semasa saya bersama-sama anggota dari Jabatan Narkotik IPK Johor membuat serang hendap di Jalan Nakhoda 7, Taman Ungku Tun Aminah, Skudai, berhadapan Hotel Apollo, datang sebuah m/lori No. Pendaftaran JDY 5101 dan sebuah motosikal No. Pendaftaran JGL 1065 yang dinaiki 2 lelaki. Saya nampak salah seorang lelaki tersebut mengeluarkan satu kotak dari atas lori bahagian belakang. Saya menghampiri dan memperkenalkan diri sebagai pegawai polis kepada mereka, tiba-tiba kedua lelaki India tersebut melarikan diri, sementara pemandu lori terus memecut lori dan melanggar kenderaan pasukan yang cuba menghalangnya dan berjaya melarikan diri. Saya dapat menangkap lelaki India yang mengangkat kotak tadi dikenali dengan nama Nanda Kumar a/l Kunyikanan. K/P: 770122-01-5747, Alamat: No 12, Jln Johar 7, Tmn Desa Cemerlang, 83000 Ulu Tiram. Seorang lagi lelaki India dapat ditahan l/kurang 50 meter dari tempat kejadian dikenali dengan nama Poobalan a/l Mariapan. K/P: 770118-01-7053, Alt: No 20, Jln Perwira Tmn Timor, 81000 Kulai. Saya kemudian membuat pemeriksaan ke atas kotak tersebut mendapat ia berisi 2 ketulan bahan tumbuhan mampat berbalut plastik lutsinar yang disyaki ganja dan 4 ketulan bahan tumbuhan mampat berbalut kertas timah dan plastik lutsinar yang disyaki ganja. Turut ditahan M/sikal No. Pendaftaran WCA 8941. Saya tahan kedua lelaki India itu untuk siasatan lanjut.

Sekian, laporan saya.

[56] In his examination-in-chief, SP4 testified as follows (see pp. 24 to 26 of the appeal record):

Perjalanan daripada Johor Bahru ke Taman Ungku Tun Aminah memakan masa lebih kurang setengah jam. Selepas kami sampai, kami pun meletakkan kereta berhampiran Hotel Apollo.

Pada jam 7.30 petang, telah datang seorang lelaki India dengan menaiki sebuah motosikal untuk berjumpa dengan saya. Lelaki India itu mahu melihat wang sebanyak RM22,000.00 untuk dikira. Pengiraan wang dibuat dalam kereta yang saya naiki. Pada masa itu L/Kpl Sabran berada di luar kereta. Setelah pengiraan wang dibuat, dan beliau mendapatinya cukup, dia telah menghubungi seseorang. Selepas itu seorang lelaki India telah datang dan mengira sekali lagi wang tersebut di dalam kereta yang saya naiki.

Lelaki India yang membuat kiraan pada kali pertama ialah OKT2. Lelaki India yang datang kemudian dan membuat kiraan kali kedua ialah OKT1.

Selepas kiraan kali kedua dan didapati wang tersebut cukup, saya bersama OKT1 telah keluar dari kereta tersebut dan OKT1 telah berhubung melalui hand phone kepada seseorang. Lebih kurang 10 minit kemudian, telah datang sebuah lori dan diletakkan bersebelahan dengan kereta yang saya naiki. Setelah lori itu berhenti, OKT1 telah mengambil satu kotak di bahagian belakang lori. Kotak itu diturunkan dan ditunjukkan kepada saya. Apabila OKT1 membuka kotak itu, saya nampak bahan daun-daun kering yang disyaki ganja dan disalut dengan plastik lutsinar. Setelah saya dapati ianya ganja, saya pun terus membuat isyarat tangan dengan menyapu tangan ke rambut. Pada masa itu beberapa orang anggota serbuan telah menyerbu dan cuba menangkap kedua-dua lelaki India itu. Selepas itu saya terus beredar dari tempat itu.

[57] SP6 testified in his examination-in-chief in this way (see pp. 40 to 42 of the appeal record):

Selepas taklimat, pada jam lebih kurang 6.00 petang, saya bersama anggota kumpulan berlepas ke tempat sasaran dengan menaiki kenderaan polis. Sesampai di sana lebih kurang jam 6.30 petang, saya arahkan anggota-anggota berligar-ligar dan memberi pemerhatian kepada Kpl Yusof (SP4) yang bertindak sebagai Penyamar Sulit untuk melihat isyarat yang akan diberikan apabila beliau melihat dadah jenis ganja. Pada masa itu saya bersama L/Kpl Samsudin berada dalam kereta Kancil di jalan Hotel Apollo.

Pada jam lebih kurang 8.00 malam, saya nampak sebuah lori satu tan datang ke situ mengikut jalan yang bertentangan. Di situ ialah jalan sehala tetapi lori datang secara bertentangan. Lori itu berhenti di hadapan Hotel Apollo. Pada masa yang sama, SP4 bersama 2 orang lelaki India sedang berbual-bual. Saya nampak salah seorang daripada lelaki India itu mengambil satu kotak daripada bahagian belakang lori dan meletakkan di tepi jalan. Tidak lama kemudian, saya nampak SP4 memberi isyarat dengan menyapu tangan ke kepala. Pada masa itu, saya bersama anggota terus pergi menyerbu. Saya bersama anggota bernama Payaman telah menangkap Nanda Kumar. Dia ada di mahkamah pada hari ini.

Mahkamah: Saksi menunjuk kepada OKT1. OKT1 dicamkan.

Seorang lelaki India lagi telah melarikan diri dan dikejar oleh anggota saya. Lelaki itu kemudiannya dikenali sebagai Poobalan.

Mahkamah: Saksi menunjuk kepada OKT2. OKT2 dicamkan.

Semasa OKT1 ditangkap, dia berada di hadapan Hotel Apollo. Semasa hendak menangkap OKT1, ada berlaku sedikit pergelutan.

Semasa hampir dengan OKT1, saya menjerit perkataan 'polis' sambil menunjukkan kad kuasa polis kepada lelaki berkenaan. A

Jarak antara kereta yang saya berada dan SP4 pada masa itu ialah lebih kurang 10 meter.

Saya boleh cam SP4. B

Mahkamah: Kpl Mohd Yusof Keling dicamkan.

Semasa tangkapan dibuat, saya rampas sebuah kotak yang mengandungi 6 ketulan bahan mampat yang disyaki dadah jenis ganja. Dua daripada ketulan tersebut tidak berbalut kertas timah. C

Mahkamah: Eks. ID5 ditunjuk kepada saksi.

Eks. ID5 ialah kotak yang dirampas. Pada kotak itu saya ada turunkan tandatangan saya dan mencatat tarikh 24.8.2002.

Mahkamah: Eks. ID5 dikemuka dan ditanda sebagai Eks. P5. D

Eks. ID6-ID11 ditunjuk kepada saksi dan dicamkan. Dikemukakan dan ditanda sebagai Eks. P6, P7, P8, P9, P10 dan P11.

Selepas tangkapan, rampasan dan pemeriksaan, saya bawa OKT dan barang kes ke pejabat untuk buat laporan polis. Sebelum buat laporan polis, saya buat 'search list' di hadapan kedua-dua OKT mengenai barang-barang yang saya rampas. E

Mahkamah: Skudai Report 8696/2002 ditunjuk kepada saksi. Dikemuka dan ditanda sebagai Eks. P17. F

Inilah laporan polis yang saya buat.

[58] Now, the testimony of SP4 when compared with the evidence of SP6 tallied. Even the police report of SP6 tallied with the testimonies of SP4 and SP6. The available evidence, at the scene of the crime, depicted both A2 and A1 counting the monies in SP4's motor car. And thereafter A1 contacted someone over the telephone. Meanwhile, the police personnel took up positions in the vicinity of Hotel Apollo waiting anxiously for SP4 to give the requisite signal. A motor lorry arrived and both SP4 and SP6 saw A1 removing a box from the back of the motor lorry. A1 opened the box in the presence of SP4. Compressed dried leaves suspected to be ganja were seen in the box. SP6, also saw what was happening and he introduced himself as a police officer to A1 and A2. Both the appellants took flight. They ran helter-skelter. SP6 managed to arrest A1. While A2 was also arrested G H I

A approximately 50 metres away. The driver of the motor lorry managed to escape after he drove the motor lorry at a fast speed and crashed against a police vehicle that tried to prevent his escape. It was drama in real life. The sum total of it all was this. That the learned JC rightly convicted both the appellants for
B trafficking in dangerous drugs, to wit, 6004.3 grammes and sentenced them to death.

[59] The flight of an accused after an offence has been committed may amount to an admission by the accused of his
C guilt and that would be an admissible evidence. Each case must be dependent on its own peculiar facts. Here, after the box was unloaded by A1 and A1 opened the box in the presence of SP4 and its contents exposed, SP6 introduced his office and both the appellants fled. In the circumstances of this case, it is safe to
D connect both the appellants with the offence (*PP v. Chia Leong Foo* [2000] 4 CLJ 649 which quoted the speech of Lord Ackner in *Chan Kwok Keung & Anor v. The Queen* [1990] 1 CLJ 411, CA, at p. 413) bearing in mind that, on 22 August 2002, both the appellants discussed with SP4 about the sale transaction of ganja
E at the price of RM1,200 per kilogramme. This was an outright case of trafficking.

[60] Next, it was argued that the learned JC seriously misdirected himself when he held that the failure on the part of
F the prosecution to call witnesses, namely, Hairil and Kamarulzaman, had no material effect on the case for the prosecution. It was further argued that the learned JC failed to recognise that the evidence of these two individuals would have been significant to the defence, in particular the defence of A2
G who said that he had no knowledge of the contents of the box wherein the drugs were found. In our judgment, these arguments are without merit. We must allude to the evidence of SP9.

[61] In his testimony, SP9 stated that on the date of the incident – 24 August 2002, the motor lorry bearing registration
H number JDY 5101 that was used to send the cannabis to Hotel Apollo was driven by someone named Hairil. Together with SP9 in the said motor lorry was another male Malay by the name of Kamarulzaman. When the said motor lorry arrived at Hotel Apollo, SP9 saw Kamarulzaman alighted from the said motor lorry and
I spoke to A1. Thereafter, SP9 saw Kamarulzaman re-entered the

said motor lorry. And as soon as the box (exh. P5) which contained cannabis was unloaded by A1 from the said motor lorry, the police party launched an ambush. At that juncture, according to SP9, Kamarulzaman directed Hairil to escape with the said motor lorry. And all three of them – SP9, Kamarulzaman and Hairil, managed to escape.

[62] There was evidence to show that SP9 took his wife and child and sought refuge in a chalet in Mersing. Hairil and Kamarulzaman also fled. SP9 testified that his late father by the name of Encik Zakaria bin Mohamed Ghazali who was the owner of the motor lorry JDY 5101 was remanded by the police. On 25 August 2002 at about 8.30pm, SP6 arrested SP9 at the Mobil petrol pump station, Jalan Tebrau, Kampung Melayu Pandan, Johor Bahru.

[63] It was argued by learned counsel that the failure on the part of the police to trace Hairil and Kamarulzaman for them to come to court to testify had greatly affected the prosecution's case for the following reasons:

(a) that both Hairil and Kamarulzaman were material witnesses who could give evidence pertaining to what had transpired at Hotel Apollo when the motor lorry arrived there and soon thereafter they escaped from the scene;

(b) that there was every possibility that the cannabis belonged to Hairil and Kamarulzaman and that both the appellants were their victims; and

(c) that the police failed to conscientiously track and arrest Hairil and Kamarulzaman and, consequently, s. 114(g) of the Evidence Act 1950 should be invoked

[64] Under s. 114(g) of the Evidence Act 1950 the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. The usage of the word "may" gives the discretion to the court whether or not to invoke the adverse inference to a given set of facts. It is not a mandatory inference.

[65] Since time immemorial, the courts are reluctant to draw an adverse inference against the prosecution. The courts must be satisfied that:

A (a) the witness that was not offered was a material witness;

(b) the prosecution purposedly withhold evidence which it possessed and which was always available; and

B (c) what the prosecution did was done with an ulterior motive to frustrate the defence.

[66] With these basic guidelines, we will now examine the case before us. We note that the prosecution was not in a position to arrest and bring Hairil and Kamarulzaman to court notwithstanding C that concerted attempts were made by the police to trace them. According to SP6, at the time of the offence at Hotel Apollo, the three of them – referring to SP9, Hairil and Kamarulzaman managed to escape when the motor lorry they were in collided against two police vehicles which were used to thwart their D escape. Only SP9 who was in the motor lorry was arrested at the petrol station at Jalan Tebrau, Kampung Melayu Pandan, Johor Bahru. It was SP9 who showed to SP6 the location where the motor lorry was kept and SP6 eventually seized the said motor lorry. According to SP6, Encik Zakaria bin Mohamed Ghazali – E the father of SP9 and the owner of the said motor lorry was also arrested. While Hairil and Kamarulzaman could not be traced and therefore could not be arrested. According to the investigating officer by the name of Chief Inspector Ihsan bin Abdullah (SP8), concerted attempts were made to trace Hairil and Kamarulzaman F by SP6 continuously but to no avail.

[67] It is our judgment that the failure by the prosecution to call Hairil and Kamarulzaman to give evidence in court cannot be categorised as "withholding or suppression of evidence" but rather G concerted attempts to trace them were not successful. It follows that these two witnesses were outside the control of the prosecution. Consequently, s. 114(g) of the Evidence Act 1950 should not be invoked (*Munusamy v. PP (supra)*; *Yeo Choon Huat v. PP* [1998] 1 SLR 217, CA; and *Srichand K Khetwani v. The* H *State of Maharashtra* [1967] AIR SC 450).

[68] The evidence of SP4 as an agent provocateur showed the culpability of both the appellants as drug traffickers. From the discussions in regard to the sale of the ganja to the delivery of the ganja to SP4 at Hotel Apollo – all pointed to the involvement I of both the appellants. At Hotel Apollo, the testimonies of SP4, SP5, SP6 and SP9 further showed the depth of the culpability of both the appellants.

[69] On common intention, we are satisfied that the prosecution had successfully proved beyond reasonable doubt that both the appellants jointly trafficked in dangerous drugs. The available evidence can be itemised in this fashion:

(a) that both the appellants attended the meeting with SP4 and the informer on 22 August 2002;

(b) at the meeting on 24 August 2002 in front of the Tasik supermarket at Taman Ungku Tun Aminah both the appellants asked SP4 to get ready RM22,000;

(c) in front of Hotel Apollo, A2 entered the motor car which SP4 took to go to Hotel Apollo and counted the monies; after this, A1 took his turn and he too counted the monies in the said motor car;

(d) when A1 brought down the box (exh. P5) from the back of the motor lorry, A2 was near to SP4 at the scene of the crime; and

(e) according to SP5 when SP4 was examining the box (exh. P5), A2 who was near the motor car was observing what A1 and SP4 were doing.

[70] In regard to the failure of calling Encik Zakaria bin Mohamed Ghazali, we say that there was no necessity to call him. He passed away on 16 January 2003 (see p. 201 of the appeal record). The prosecution closed its case on 9 May 2007 (see p. 78 of the appeal record). The defence was only called on 28 July 2007 (see p. 97 of the appeal record). And A1 gave evidence on oath on 24 October 2007 (see p. 99 of the appeal record). Likewise, A2 also gave his evidence on oath on 24 October 2007 (see p. 104 of the appeal record).

[71] In regard to the complaint that SP7 acted on information received which was said to be hearsay, prejudicial to both the appellants and inadmissible citing *Chan King Yu v. PP* [2009] 1 CLJ 601, FC, with respect we have this to say. The police just cannot stand idle and ignore any information received about drug trafficking without taking any investigative action. There will be public outcry if the police were to adopt a nonchalant attitude and let such information be discarded and allow drug traffickers' leeway in trafficking the drugs without any intervention by the

police. If that were to happen, Malaysia will become a haven for drug traffickers. Is it the law that only when a policeman in uniform sees an individual selling a dangerous drug to a buyer, then the policeman in uniform will act accordingly? No criminal would want to commit an offence before a policeman in uniform. That would be sheer stupidity.

[72] We have s. 40A of the Act. And Yusof Abdul Rashid J in *PP v. Mohamed Halipah (supra)* aptly said at pp. 156 to 157:

> Generally, the court is always wary in accepting the evidence of an agent provocateur but in this case the Legislature under section 40A of the Dangerous Drugs Ordinance, 1952 had dictated that the evidence of any agent provocateur shall be admissible and treated as any other evidence from any ordinary witness. The said section 40A provides:
>
> > 40A. Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under section 39B or regulations made thereunder if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.
>
> It is indeed difficult to secure evidence in the normal way where an offence under section 39B of the Ordinance is concerned and the act of the police in resorting to this method of using an agent provocateur, though undesirable, is necessary in circumstances where drug trafficking has become a national issue, which may lead to national crisis. By virtue of section 40A of the Ordinance, the evidence of an agent provocateur need no corroboration to found a finding by a court, ...

[73] When SP4, the agent provocateur, met both the appellants they mentioned that one kilogramme of ganja priced at RM1,200. It tallied with the information which SP7 received from the informer. Bearing in mind that the evidence of SP4 need no corroboration, this court must accept the evidence of SP4 as credible and admissible.

[74] There are provisions in the CPC pertaining to the reception of information relating to the commission of an offence. They are housed in Part V, Chapter XIII of the CPC. And they carried the caption "Information To Police And Their Powers To Investigate". Section 107 of the CPC reads as follows:

Information of offences

107.(1) Every information relating to the commission of an offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant.

(2) Every such information shall be entered in a book to be kept by that officer, who shall append to such entry the date and hour on which that information was given, and whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it.

(3)(a) Notwithstanding subsection (1), information given by a person relating to the commission of an offence to a police officer, who at the time of receiving the information is not in a police station, shall be deemed to be received at a police station.

(b) A police officer receiving such information under paragraph (a) where practicable shall record or cause to be recorded the name and address of the informant, the date and time of the receipt of such information, and shall convey such information to an officer in charge of a police station or any police officer whose duty is to receive such information.

(c) Such information shall be reduced to writing and entered in a book in accordance with subsections (1) and (2) and shall subsequently be signed by the person who gave the information.

(4) A police officer shall be duty bound to receive any information in relation to any offence committed anywhere in Malaysia.

[75] Any police officer is duty bound to receive any information in relation to any offence committed anywhere in Malaysia. And the report of an offence can be made to any police officer and the said report is deemed to be received at the police station. The police officer receiving the report must record in writing the name, address of the informant and the date and time of the receipt of such information.

[76] The word "information" is not defined in the CPC. But the word "complaint" is defined in s. 2 of the CPC as an "allegation made orally or in writing to a magistrate with a view to his taking action under this Code that some person whether known or unknown has committed or is guilty of an offence". According to Thomson CJ in *PP v. Leonard* [1959] 1 LNS 75; [1960] 26 MLJ 13, CA, at pp. 14 to 15:

> Then there may be an information and there may be a complaint, but an information and a complaint are entirely different things and the failure to distinguish between them can lead to very great confusion in thought. An information is a statement relating to the commission of an offence made to a Police Officer under section 107 of the Code and a complaint is an allegation made to a Magistrate with a view to his taking action under the Code.

[77] Even though SP7 received the information on 20 August 2002, he did not reduce that information in writing as required by s. 107(1) of the CPC. It was only after the successful arrest of both the appellants and the seizure of the dangerous drugs in the box, a police report was lodged by SP6 on 25 August 2002 at 4.20am as per exh. P17. We are constrained to say that despite the fact that SP7 had acted on information received from the informer, it cannot per se be construed as hearsay, prejudicial and inadmissible in one breath. We must look at the whole evidence in its correct perspective. In our judgment there was ample evidence through the agent provocateur – SP4, upon which the learned JC could find both the appellants guilty of trafficking in the dangerous drugs as per the charge and convict them accordingly without occasioning any miscarriage of justice. There was also supportive evidence of SP5, SP6 and SP9 – all pointing to the guilt of both the appellants.

[78] In *Ooi Hock Leong v. Regina* [1995] 1 LNS 84; [1955] 21 MLJ 229, 230, Spenser Wilkinson J held that "the fact that the complainant's report was not produced and that the conviction of the principal thief was not strictly proved I came to the conclusion that there remained ample evidence upon which the learned magistrate could find as he did and there was no failure of justice, and I therefore dismissed the appeal."

[79] The facts in *Chan King Yu v. PP (supra)*, a decision of the Federal Court, showed that the appellant was arrested in a hotel room that he had checked in after a police party raided the room.

The drugs were found in the room at the time of his arrest. The main issue was whether the lower courts failed to give proper consideration to the facts and evidence of the case that pointed to the possibility that the case was framed against the appellant. The Federal Court held by way of a majority (Hashim Yusof FCJ and Zulkefli Makinudin FCJ) that there were infirmities and glaring discrepancies in the prosecution's case and that the defence had succeeded in raising a reasonable doubt on the prosecution's case. There was evidence that the appellant from the time of his arrest and throughout the entire trial had consistently maintained that he had no knowledge of the drugs and that the drugs found in the three plastic bags in hotel room 1303 in fact belonged to the person named Man Chai and that the appellant genuinely believed that the three plastic bags contained tools. The defence was not one of mere denial but there was an explanation that the drugs could have belonged to Man Chai and that Man Chai could have been the trafficker. That the appellant was at most an innocent carrier.

[80] By way of a majority, the Federal Court further held that in *Chan King Yu*'s case, the police failed to investigate the local telephone numbers and the last ten calls made and received by the appellant. That would have led to the discovery of the people the appellant was in contact with, and to the existence of one Man Chai. It was held that Man Chai was not a fictitious character and that Man Chai played a major role in leading the police party to effect the arrest on the appellant. It was also held that the police had all the time to check the veracity of the material particulars relating to the existence of Man Chai that was disclosed by the appellant in his cautioned statement. It was further held that the burden was on the prosecution to check whether the appellant's version of the facts as they appeared in the cautioned statement was true or false.

[81] Again by way of a majority the Federal Court also held in *Chan King Yu*'s case that there was evidence to show that the raiding party intentionally destroyed crucial evidence to cover up the first raid conducted in the absence of the appellant to plant the said drugs and implicate the appellant. It was also held that there were material contradictions or discrepancies in the evidence of the prosecution witnesses when compared with that of the defence witnesses. Finally, it was further held that since the police

party acted on information received to arrest and detain the appellant such information was said to be hearsay, prejudicial to the appellant and therefore inadmissible.

[82] By way of a dissenting judgment, Abdul Aziz Mohamad FCJ held that the trial judge's rejection of the defence was made upon an objective consideration of all the admissible evidence from which he found that the appellant was in possession of the drugs. His Lordship further held that the trial judge rejected the defence, which involved Man Chai, because with the finding that the appellant was in possession of the drugs, it made no difference to his guilt if he was keeping the drugs for Man Chai who was said to be coming to the hotel to collect it. His Lordship also held that the trial judge's mention of the information received by the police and of the appellant being the target of the police and not Man Chai was merely to imply that the focus of the police operation and of the case was the appellant. Finally, his Lordship held that the appellant's guilt was established by proof of possession and not that of Man Chai, whatever his concern with the drugs might have been.

[83] The facts in the present appeal are poles apart from the facts in *Chan King Yu*'s case. Just like Abdul Aziz Mohamad FCJ, we do not find anything objectionable when SP7 acted on information received from the informer although that information was not reduced in writing as required by s. 107(1) of the CPC. As it turned out, the information was really true.

[84] There was no ample evidence to convict the appellant of trafficking in drugs in *Chan King Yu*'s case and that was the reason why the appellant's conviction and sentence of death were set aside by the Federal Court by way of a majority. Here, as demonstrated earlier in this judgment, there was more than ample evidence to convict both the appellants as per the charge.

[85] What is hearsay? It is defined by Mr LMD De Silva for the Privy Council in *Subramaniam v. PP* [1956] 1 WLR 965 at p. 970, PC in this way:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was

made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.

[86] The appellant in *Subramaniam v. PP (supra)* was charged with being in possession of firearms without lawful excuse and his defence was that he was acting under duress in consequence of threats uttered by Malayan terrorists. The judge would not allow the accused to state what had been said by the terrorists and the Judicial Committee advised that the conviction should be quashed because the reported statements were tendered as original evidence and ought to have been received as such.

[87] The decision in *Subramaniam v. PP (supra)* was also applied in *Mawaz Khan and Amanat Khan v. The Queen* [1967] 1 AC 454, PC, [1967] 1 All ER 80, PC, where each appellant made a statement in the absence of the other setting up the same demonstrably false alibi. It was held that these statements were admissible, not, of course, in order to establish their truth, but in furtherance of the Crown's contention that the appellants were conspiring to fabricate evidence.

[88] There is always the danger that hearsay evidence may be concocted because the maker is not called. Here, the informer was not called and so SP7's evidence in regard to the information that one male Indian was offering to sell 20 kilogrammes of ganja at the price of RM1,200 per kilogramme was not reduced in writing in compliance with s. 107(1) of the CPC and it may have been concocted. But the evidence of SP4 as an agent provocateur who saw and heard what had transpired showed that it was not a concoction. It really happened. Section 40A of the Act, as framed by Parliament, excludes the hearsay rule entirely and that section applies to SP4 as an agent provocateur. And SP5, SP6 and SP9 supported the evidence of SP4.

[89] SP7 received the information from the informer and pursuant to that information SP4 was directed to act as an agent provocateur. The informer in this case merely played a minor role of introducing SP4 to both the appellants. That is the degree of the informer's participation. The informer here has not assumed the role of an agent provocateur (*PP v. Chong Chee Kin & Anor* [1995] 1 LNS 301; *Lee Lee Chong v. PP* [1998] 4 CLJ 655, CA; *PP v. Chong Nyuk Min & Anor* [1995] 1 LNS 182; *K Saravanan*

A *S Karuppiah v. PP* [2002] 3 AMR 3214, CA; *PP lwn. Mohd Isha Alias & Satu Lagi* [2003] 2 CLJ 142, CA; and *PP v. Mansor bin Md Rashid & Anor* [1997] 1 CLJ 233 FC).

[90] The informer here was protected by s. 40 of the Act and
B the learned JC rightly held that the prosecution was correct in not calling the informer to give evidence. It is now appropriate to reproduce s. 40 of the Act. It reads as follows:

> Protection of informers
>
> C 40.(1) Except as hereinafter provided, no complaint as to an offence under this Act shall be admitted in evidence in any civil or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to his discovery.
>
> D (2) If any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding whatsoever contain any entry in which any informer is named or described or which might lead to his discovery, the Court before which the proceeding is
> E had shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery, but no further.
>
> (3) If on trial for any offence under this Act the Court, after
> F full inquiry into the case, is of opinion that the informer wilfully made in his complaint a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceeding the Court is of opinion that justice cannot be fully done between the parties thereto without the discovery of the informer, the
> G Court may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer.

[91] Here, the learned JC did not express any opinion pursuant
H to s. 40(3) of the Act. Put in another way, the learned JC did not express an opinion that the informer wilfully made in his complaint a material statement which the informer knew or believed to be false or did not believe to be true. Neither was the learned JC of the opinion that justice cannot be fully done
I between the parties thereto without the discovery of the informer which necessitates the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer.

[92] So, we have a situation where the informer was fully protected under s. 40 of the Act and there was no necessity for him to come to court to give evidence. It makes no sense to have s. 40 of the Act and yet the informer's identity be made known. It is a long established rule of law that witnesses may not be asked and should not be allowed to disclose the names of informers or the nature of the information given (*Hardy* [1794] 24 State Tr 199). The rationale for this simple rule was explained by Lawton LJ in *R v. Timothy John Hennessey* [1979] 68 Cr App R 419, at p. 426:

> The courts appreciate the need to protect the identity of informers, not only for their own safety but to ensure that the supply of information about criminal activities does not dry up.

[93] It is our judgment that s. 40 of the Act creates a statutory exception to the hearsay rule, and that there is no necessity for the informer to appear in court and testify. If informers are required to testify, then there will be a day when information pertaining to criminal activities stop coming and the crime rates will go up.

[94] We are aware of what Lawton LJ said in *R v. Timothy John Hennessey (supra)* at p. 425:

> Subject to a few exceptions witnesses, whether for the prosecution or the defence, are required to testify what they saw, heard, smelt or felt and not to what they know because of what they have been told.

[95] In *The Queen v. Benz And Another* [1989] 168 CLR 110, at 144, Gaudron and McHugh JJ said that a strong case could be made for admitting hearsay evidence where it appears to have a high degree of reliability.

[96] In *Walton v. The Queen* [1989] 166 CLR 283, at 293, Mason CJ said:

> The hearsay rule should not be applied inflexibly. When the dangers which the rule seeks to prevent are not present or are negligible in the circumstances of a given case there is no basis for a strict application of the rule. Equally, where in the view of the trial judge those dangers are outweighed by other aspects of the case lending reliability and probative value to the impugned evidence, the judge should not then exclude the evidence by a

A rigid and technical application of the rule against hearsay. It must be borne in mind that the dangers against which the rule is directed are often very considerable, as evidenced by the need for the rule itself.

B **[97]** *Vijayaratnam v. PP* [1961] 1 LNS 149 was a case where the appellant there was charged under s. 381 of the Penal Code and Hashim J said that the expression "on information received" should not be used by police officers when giving evidence as its use may cloud the issue and/or prejudice the court against the accused and this case was also used by learned counsel to bolster C its argument that SP7 had acted on information received which was said to be prejudicial to both the appellants.

[98] It is obvious that the facts in *Vijayaratnam v. PP (supra)* are different from the facts of the present appeal. There was no D informer involved. And that case was decided on 18 October 1961 and only reported in 1962. Times have changed and inroads into the hearsay rule have been made.

[99] Even though *Chan King Yu*'s case was a drug trafficking case, E yet that case, with respect, did not consider the need to protect the identity and safety of informers. That case too did not consider the provisions of s. 107(1) of the CPC and the statutory protection accorded to informers generally under s. 40 of the Act. And there was no agent provocateur in that case.

F **[100]** Be that as it may, it is perhaps opportune to refer to the speech of Lord Goddard CJ, on behalf of the board, in the case of *Kuruma, Son of Kaniu v. The Queen* [1955] AC 197, at p. 203. There his Lordship said:

G ... the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case there are decisions H which support it, and in their Lordships' opinion it is plainly right in principle.

[101] Next, it was argued that the evidence of the Government Chemist – SP1, was not credible and the defence also questioned the method of analysis and the weight of the drugs that was I arrived at. But the law is quite clear. We have to accept the evidence of the Government Chemist at face value (*Khoo Hi*

Chiang v. PP & Another Case [1994] 2 CLJ 151, SC; *Munusamy v. PP (supra)*; *PP v. Lam San* [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 341, SC; *Looi Kow Chai & Anor v. PP (supra)*; *Balachandran v. PP (supra)*; *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551, CA; and *PP v. Ooi Teng Chian* [2005] 4 CLJ 557, CA).

[102] We have perused through the evidence of the Government Chemist in the appeal record and we found that the evidence of the Government Chemist to be relevant, credible and acceptable. The defence did not call rebuttal evidence to challenge the evidence of the Government Chemist.

[103] The procedure for admittance of expert evidence is housed in s. 399 of the CPC and its acceptance is regulated by s. 45 of the Evidence Act 1950. We are satisfied with the evidence of the Government Chemist and the analysis carried out by him showed that the compressed dried leaves were cannabis, a dangerous drug, weighing 6004.3 grammes.

[104] It is our judgment, on the available evidence, that the convictions are safe. It is also our judgment that both the appellants had failed to raise any reasonable doubt as to their guilt. We are satisfied that the prosecution had proved beyond reasonable doubt the charge against both the appellants. Accordingly, we dismissed both the appellants' appeal. Their convictions and sentences are hereby affirmed.